*NAACP v. Claiborne Hardware*, 458 US 886, 929 (1982) (Emphasis added)

> Accordingly, a function of free speech under our system of government is to invite dispute. *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.* Speech is often provocative and challenging. It may strike at the prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

*Terminiello v. Chicago*, 337 US 1, 4 (1949) (Emphasis added)

At least as they apply to that "currently disfavored class of antiabortion protestors," *Lawson v. Murray*, 515 US 1110, 1113 (1995) (Scalia, J., concurring in denial of cert.), the Ninth Circuit now limits free speech and freedom of the press to "dulcet phrases" and "safe" protests.

## III.
## The Ninth Circuit has imposed an indiscernible standard for pro-life speech and journalism

According to the en banc Majority Opinion, the threat lies not in the *content* of the posters—*which the Majority Opinion concedes is protected*, even though the jury was not so informed—but rather in the posters' so-called "wanted-style *format*."

The en banc Majority Opinion concluded that publication of earlier posters with a "similar" format, created and circulated by people other than Petitioners and followed

months later by isolated acts of violence against persons named in these earlier posters, created the "poster pattern" that made subsequent posters a "true threat." (deP. Op. Br. p. 32) The Majority Opinion dubs this merely temporal and coincidental relation between posters and violence as "the poster pattern" and proposes that the "poster pattern" suffices to convert future posters with the same or "similar" format into *per se* death threats against the persons named, *regardless of what the posters say.* (App. pp. 119-123).

Moreover, the "poster pattern" theory defies this Court's repeated teaching that restrictions on speech must give fair warning of what is proscribed. *Coates v. Cincinnati*, 402 US 611 (1971). Nowhere does the en banc Majority Opinion give deParrie, or anyone else, a clue as to what are the actionable elements of the now-forbidden "wanted-style format," much less how one can determine what is the undefined "equivalent" of this format, which is also banned under the Order. As a matter of due process, a law is void if persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 US 385, 391 (1926)

While vagueness challenges are most common in criminal statutes, they are no less important in a civil context when political activists can be crushed, as in this case, with punitive monetary sanctions beyond anyone's ability to pay. When an unprecedented and ill-defined First Amendment theory is unanimously rejected by the original three-judge panel and barely accepted by a 6 to 5 en banc majority, it is fair to say that the new theory has and will "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 US 104, 108-09 (1972).

The principles set in motion by the en banc Majority Opinion perpetuate deprivations of liberty and property

without due process of law. Nowhere does the majority Opinion give any guidance for identifying the actionable elements of the now-forbidden "wanted-style format" – much less how one may determine the undefined "equivalent" which is also banned under the Order. Instead, the Majority Opinion states only the following:

- It is not the words or captions chosen that make a "wanted-style" poster (App. pp. 120-23.).

- It is the "WANTED" or "unWANTED" poster "*format*" that is forbidden by FACE and RICO (*Id.*).

- This "wanted-style format" does not require use of the words "WANTED" or "unWANTED" (*Id.*).

- The forbidden format may, or may not, use any of the words used in the previous "pattern" posters on Gunn, Patterson, and Britton (*Id.*).

- The words used do not have to contain explicit threats (*Id.*).

- The words do not have to contain ambiguous threats (*Id.*).

- It is possible to use the forbidden "format" while publishing content that calls only for only lawful, peaceful protest (*Id.*).

- The words chosen are, in fact, "immaterial," according to the Majority. (*Id.*)

- The forbidden "format" need not have any direct connection to any act of violence to gain "currency as a death threat" (App. p.109)

- The forbidden "format" need have only a remote or tangential relationship to *three* acts of violence (but not two acts of violence) in order to gain "currency as a death threat," even if thousands of other protest posters naming abortion doctors have no relationship, even merely temporal, to violence (App. pp.109, 131-33; Trial Tr. 2828; deP Rep. Br. p. 32).

This is the "unascertainable standard" prohibited in *Coates* and dozens of other cases. Since the "format" does not depend on content, and the "format" is never described, deParrie has no way of knowing what form of material violates the Order. The only safe course is to cease publishing any posters or indeed anything at all, concerning the respondents.

## IV.
## The Ninth Circuit has effectively outlawed a classic form of political activism

As an activist, deParrie has been engaged in everything from street preaching of the Gospel, literature distribution, holding signs, chanting, marching, and even – at earlier times – sit-ins. These forms of expression surround issues such as abortion, homosexuality, pornography, anti-war, and others. Since 1985, however, his main issue has been

abortion/euthanasia/infanticide. For this reason he chose to work for *Life Advocate magazine*. DeParrie sometimes covered the activism from afar as an observer for the media while, at other times, he was personally involved in the same activism. (Trial Tr. 2813-14)

As a writer, deParrie has studied activism's history—especially the use of handbills and posters in their various forms. The "accusatory" poster has been a staple in this country since before the Revolution, and in deParrie's lifetime, since the Vietnam War. (Trial Tr. 2793)

The Court may take judicial notice of the "wanted" poster that was evidence before the Warren Commission. The poster declares President John F. Kennedy "wanted" for "treason" and was handed out in the days preceding – and even on the very day – of the assassination. (L 10) Such posters are common currency in American political activism.[7] Given that the Ninth Circuit itself has recognized that the threshold of a "true threat" against the President is *lower* than that for threats against private citizens like respondents (*US v. Twine*, 853 F2d 676 (9th Cir. 1988), how can the en banc Majority Opinion's quasi-criminalization of posters of abortionists possibly be justified, given that posters of Presidents are perfectly legal despite the "context" of presidential assassinations and death threats against the President?

The en banc Majority Opinion is correct that petitioners knew of the three previous incidents where abortion workers

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[7] A "WANTED" poster of President George W. Bush (L. 11), handed to deParrie at a May Day Rally in Portland, Oregon, appears on the website www.motherearth.org/bushwanted.

were killed,[8] but they were also fully aware of the fact that the anti-abortion movement had been issuing thousands of such posters for many years *without* subsequent violence. The petitioners were aware that such violence was *an anomaly*, not the norm. (Trial Tr. 2828; App. pp. 131-34)

Many of the petitioners were readers of *Life Advocate* magazine, which carried regular stories about the use of posters in various locales. DeParrie testified at trial about having personally seen hundreds of such posters and having in his possession in court about 85 of them. (L 24-67) None of the subjects of these posters had been shot or killed. (Trial Tr. 2828).

Furthermore, in 1995, deParrie organized, under ALM, the S.H.A.M.E.[9] Campaign. That campaign consisted of a residential picket of a different abortionist's house each month. Part of the process was to create a poster of each abortionist complete with picture, home address, and, where available, phone numbers. These were passed out door-to-door in the neighborhood during the picket. By the end of the campaign 16 months later, 15 abortionists' houses had been picketed and their neighbors received posters – including the separate residences of Respondent James Newhall and Respondent Elizabeth Newhall. (L 12, 16, 17, and 18)

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[8] The en banc Majority Opinion repeatedly observes that these posters were issued prior to the deaths of the named abortionists, yet never points out that the posters were followed only remotely by violence and in Patterson's case, remotely in distance from the place where the posters were published (i.e Pensacola, Florida, whereas the scene of the violence against Patterson was Mobile, Alabama). In any case, one would not expect such a poster to be issued *after* the death of the person named.

[9] The acronym stands for: Stigmatize, Harangue, Agitate, Mortify, and Expose.

Neither of these respondents took any legal action or bought bulletproof vests as a result of these posters and residential pickets. ***None*** of those so picketed were shot at or killed. (deP. Rep. Br. p. 32) Nor were these posters part of the complaint in this case.

The one reaction to the campaign was from Jude Hanzo, the executive director of Respondent Portland Feminist Women's Health Center, Inc. Two of the pickets, eight months apart, had been held in front of her house. She sued deParrie under Oregon's stalking law. The complaint replicated all the specious and overreaching "context of violence" claims made in this case.

While the trial court ruled deParrie a stalker, the Oregon Court of Appeals reversed on constitutional grounds. *Hanzo v. deParrie*, 953 P 2d 1130 (Or. Ct. App. 1998). The posters were described in detail. *Id.* at 530-32. These posters are functionally indistinguishable from the "Deadly Dozen" and "Crist" posters in this case.

As the *Hanzo* decision makes clear, deParrie's own S.H.A.M.E. campaign posters were issued long after the "third strike" – the shooting of Dr. Gunn – which, according to the en banc Majority Opinion, rendered all such posters "true threats." Evidently the Oregon Court of Appeals refused to consider the "poster pattern."

After the Order issued by the district court in this case, deParrie approached the district court with a poster and a 15' x 3' banner that deParrie had designed before the Order but was intending to use in a picket outside respondent Elizabeth Newhall's hospital. Not wanting to violate the Order—which, as noted, vaguely prohibits the original posters "or their equivalent"—deParrie submitted both documents to the

court for a determination.[10] (L 67) Respondents objected to the court rendering an opinion as to whether the poster was in violation. (deP. Op Br. p. 27)

Consequently, the only way for deParrie to know whether the poster he has produced is a forbidden "equivalent" is to risk fines and jail for contempt. Now that the en banc Majority Opinion has had its say, there is no telling what could be construed as a "WANTED-style" poster. Since the en banc Majority Opinion states that content is not important, practically any anti-abortion leaflet handed out near where one of the Plaintiffs practice could be so construed. In effect, the Ninth Circuit has outlawed a classic form of political protest.

## CONCLUSION

For the foregoing reasons, as well as those articulated by Petitioners, this Court should grant a Writ of Certiorari.

Respectfully submitted,

DINA VITTORIA CELLINI
*Counsel of Record*
*(Admission pending)*
211 Bal Cross Drive
Bal Harbour, FL 33154
305-308-4668

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[10] The Order specified that the court retain jurisdiction "for all purposes, including .. interpretation" of the Order. (App. p. 292).

(6)

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IN THE

# Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, *et al.*,
*Petitioners*,

v.

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., *et al.*
*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE, CATHOLIC PEACE FELLOWSHIP, CATHOLIC WORKER HOUSES, AND THE PETER MAURIN CENTER, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

EDWARD MCGLYNN GAFFNEY, JR. *
VALPARAISO UNIVERSITY
SCHOOL OF LAW
656 S. Greenwich Street
Valparaiso, IN 46383
(219) 465-7860

JOHN W. WHITEHEAD
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906
(434) 978-3888

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

1. Whether this Court's decisions in *Scheidler v. NOW* require dismissal of the RICO claim in this case.

2. Whether this Court's decision in *Virginia v. Black* requires dismissal of the FACE claim in this case.

3. Whether this Court's decisions on standing require dismissal of the clinics for lack of standing.

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## INTERESTS OF *AMICI CURIAE*

*Amici*[1] are groups and individuals committed to nonviolence and respect for life, focusing on the connections among issues concerning human life, including poverty, racism, war, the arms race, the death penalty, abortion, and euthanasia. They support all means of nonviolent change including, but not limited to, nonviolent direct action, political and legislative action, and direct service to those suffering under these attacks on life.

*Amici* do not condone the use of physical violence against persons. In particular they deplore and condemn the killing of doctors who provided abortion services during the 1990s,[2] as well as the tactics of terrifying young women seeking to procure an abortion.

*Amici* also regret a further injustice: that these unlawful and immoral killings are widely and falsely associated with pro-life activists in general. This Court emphatically repudiated *guilt by association* in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 920 (1982). This case illustrates a new name for the same unconstitutional result: *guilt by contextual-*

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part and that no persons or entities, other than *amici curiae*, their members or counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] On March 10, 1993, nonparty Michael Griffin killed Dr. David Gunn as he was entering an abortion clinic. Pet.App.76. On August 21, 1993, Dr. George Patterson was killed, Pet.App.76, but this death occurred in the course of a robbery, and no evidence has ever been found to link this crime to any abortion protester, let alone to the petitioners. Pet.App.131-132. In July 1994 Dr. John Britton was killed by nonparty Paul Hill. Griffin and Hill were clearly motivated to commit these murders because of their victims' work in providing abortions. Pet.App.76. But as the en banc panel itself acknowledged, "Many pro-life activists in Operation Rescue condemned these acts of violence." Pet.App.77. So, too, do all of the *amici* filing this brief. No one, moreover, maintains that the communications for which the petitioners have been held liable in this case could have caused or motivated any of these three killings committed by nonparties, since these communications were published at rallies in 1995 and 1996, weeks and months *after* the doctors were killed.

*ization*. Under this device, pro-life activists may be subjected to crippling financial penalties and enjoined from speaking about their convictions by having their facially non-threatening speech being placed by judges and juries into the "context" of violent acts committed by others, presumably even if they repudiate such acts as unlawful and immoral. It is not hard to see the chilling effect of the decision below upon pro-life activists if this decision remains uncorrected.

*Amici* are further concerned that the damage of this case will not stop there. We agree emphatically with the views expressed in the final paragraph of Judge Kozinski's dissent from the opinion of the en banc court, Pet.App.128-53: "While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court—the broad and uncritical deference to the judgment of a jury—will haunt dissidents of all political stripes for many years to come." Pet.App.152-53. See also Judge Kozinski's opinion for the original panel. Pet.App.200-21.

*The Rutherford Institute* is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over 100 cases nationally, including cases that directly relate to the abortion issue and the right of those who seek by peaceful means to exercise their First Amendment rights in response thereto.

*The Catholic Peace Fellowship* (CPF) is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some of the members of CPF have engaged in nonviolent civil disobedience of laws and policies inimical to peace in today's world.

*The Catholic Worker* (CW) is a lay Catholic community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the root causes of homelessness. Committed to following the teachings of Christ on nonviolence, each house or center engages in acts of hospitality and witness to Gospel values in a variety of ways, including demonstrations against war, militarism, poverty, and abortion. Some of the CW houses publish newspapers highlighting alternative sources of information about the demands of justice and peace. Hence, these CW houses have an interest in the implications of this case for the *format* of protected communication. The houses that join this brief are: Ammon Hennacy House—Los Angeles CW (publisher of *The Agitator*); Casa Juan Diego—Houston CW (publisher of *Houston Catholic Worker*); Dorothy Day House—Washington, D.C. CW; Day House—Detroit CW (publisher of *On t+he Edge*); Duncan & Porter House—Pittsburgh CW (publisher of *Resistance and Contemplation*); Gainesville CW; Mary's House—Birmingham CW; New York CW; Peter Maurin Farm—Melville, New York; Redwood City CW; St. Francis House—Columbia CW (publisher of *Harvest of Justice;* St. Francis & Therese House—Worcester CW (publisher of *The Catholic Radical*); St. Joseph's House of Hospitality—Rochester CW (publisher of *Rochester Catholic Worker*). Each Catholic Worker house is independent and there is no "Catholic Worker headquarters."

*The Peter Maurin Center* in Washington, D.C., was established in 1997. In the words of its namesake, the center seeks to contribute to creating a "society where it is easier to be good." The Center does so by: (1) evangelizing in the Catholic Worker tradition through operating the Catholic Worker Bookstore; (2) carrying out the works of mercy through operating a furniture and household goods exchange, whereby people who have more than they need give it to the Center, which distributes it to needy people; and (3) organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and specifically to rid themselves of the Navy at Vieques; and (4) working for the abolition of the death penalty, specifically focusing on the case of Mumia Abu-Jamal.

The brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

### The Jurisdiction of the Court and the Aptness of Summary Disposition of this Case

It is undoubted that this Court has the full power of its certiorari jurisdiction over this case at this final stage of the proceedings. The denial of the petition for certiorari at an earlier stage of the proceedings, 539 U.S. 958 (2003), Pet. App.66, was not, of course, an adjudication on the merits of the case. *Missouri v. Jenkins*, 515 U.S. 70, 83-86 (1995); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964). When this Court denies a petition for certiorari at one stage of a case, as it did here, it retains its power over the entire case if it later decides to review the ultimate disposition of the case. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 672 n. 19 (1979); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1 (1973), (prior denial of certiorari does "not establish the law of the case or amount to *res judicata* on the points [later]

raised" nor does the prior denial amount to an affirmance of the interlocutory order as to which review by certiorari was denied). Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, *Supreme Court Practice* 198 (7th ed. 1993): "Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial."

This is especially true when, as here, the Court has in the meantime explored through plenary review and full opinions questions that are dispositive of the case. When petitioners sought certiorari in OT 2002, respondents opposed a stay of the Ninth Circuit's mandate, (1) noting that "there is *no final judgment* in this case" due to the *vacatur* of the punitive damages award comprising most of the verdict, (2) contending that the case was then "*not ripe*" for this Court's review, and (3) acknowledging that petitioners could seek review from this Court *on all issues* if certiorari were denied at that stage of the proceedings. Pet.9.

Now that there is a final judgment, the Court certainly has the power to grant certiorari and docket the case for plenary review on all questions presented. But it is unnecessary to expend the Court's resources in this manner. Because of intervening decisions discussed below, but ignored by the district court and the court of appeals, Pet.9-11, two of the questions presented may be easily answered by summary disposition—by granting the petition, vacating the judgment below, and remanding the case to the Ninth Circuit panel with instructions to follow this Court's explicit teaching in intervening decisions that were not yet decided when the en banc panel issued its opinion on July 10, 2002. Pet.App.67. *See, e.g., Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 577 (1985) (vacating and remanding for reconsideration in light of supervening decision).